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In the
Supreme Court of the United States

OCTOBER TERM, 1931

No. 179

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE ISSUE

The exact situation out of which the question of jurisdiction decided by the Circuit Court of Appeals arose was as follows:

The respondent, Guaranty Trust Company, is a New York Corporation, without situs or agency in Nebraska.

It appeared in the bankruptcy court in Omaha by filing a petition for reclamation of certain specific bonds which its assignor had sold to Peters Trust Company a short time prior to its being adjudicated a bankrupt. The respondent asserted its right to reclaim the bonds and recover possession thereof from the trustee because of alleged fraud, as the result of which the sale was void and title to the bonds did not pass; in other words, the respondent brought what amounted to a replevin suit for the bonds.

General Phonograph Corp. v. Fanning (C. C. A.), 6 F. (2nd) 115.

The trustee filed an answer to the respondent's petition for reclamation in which, after denying respondent's right to repossess the bonds in question, he alleged that the respondent had $31,224.60 in its possession belonging to the bankrupt estate, which had been accumulated after the adjudication, and prayed for an order directing the respondent to pay said sum to the trustee. The trustee, by his answer, thus asserted the right, not only to meet the issue tendered by respondent in its petition for reclamation, namely, the title to and right to possession of the specific bonds sold in November, 1929, but also to interject into the reclamation suit a separate and distinct cross-action of his own against the respondent, not in the nature of defense or counterclaim to the respondent's claim to the particular bonds in question, but involving a complicated series of other and different transactions and accounts, as well as a balance of money on deposit with respondent in New York.

The Circuit Court of Appeals, in its opinion in this case (Printed Record, p. 49) summed up the situation by

saying that respondent's petition for reclamation was one proceeding in bankruptcy and the attempted cross-action by the trustee in his answer was another.

> "The two proceedings were quite distinct. Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. * * * We have been cited to no authority for the proposition that a creditor or other petitioner asking specific relief against a bankrupt's estate, as provided by the Bankruptcy Act, thereby becomes subject to summary orders by the referee in matters entirely disconnected from the subject matter of such claim or petition, and no such authority is believed to exist."

It is stated on page 7 of the petition for a writ of certiorari herein that the sole question raised by the record is:

> "Did the respondent by appearing voluntarily and invoking the summary powers of the referee for affirmative relief in the course of the administration of the bankrupt estate, submit its person to the jurisdiction of the referee for the purpose of determining a claim of the trustee for relief set up in an answer to respondent's petition, and filed while respondent's petition was pending?"

More accurately stated, and narrowed down to the point actually in issue here, the sole question raised by the record is as follows:

> Did the respondent, by filing a petition for reclamation, thereby invoking the summary jurisdiction of the referee to determine the title and right to possession of certain specific personal property in the possession of the trustee, submit its person to the juris-

diction of the referee to determine a claim of the trustee set up in his answer to the reclamation petition involving matters wholly unrelated to the reclamation issue?

The Circuit Court of Appeals said "No" to the foregoing proposition, stating that it had been cited to no authority and had found none to the contrary.

II.

CROSS-ACTION WAS BEYOND REFEREE'S JURISDICTION

Neither in the court below nor in its brief here has the petitioner cited any case wherein the situation was analogous to the case at bar, in which a referee asserted any such summary jurisdiction as the petitioner contends for here, or in which any court ever sustained its exercise. We venture to say that the proposition is so fundamentally unsound and contrary to the accepted usage and practice of courts of bankruptcy that it was never before seriously put forward.

It is conceded that the trustee could not have maintained an independent action, either summary or plenary, against the respondent in the bankruptcy court or in any other Nebraska court either state or federal, respecting the matters set up by him in his attempted cross-action in the reclamation proceedings. The respondent had neither situs, agency, nor property within the territorial jurisdiction of any such court, and a summary order to show cause issued by the referee, or other court process, could not have been served upon it. The respondent came into the bankruptcy court for only one purpose, namely, to reclaim certain specified bonds; it tendered

only the issue as to the title and right to possession of these bonds. It did not thereby submit itself to the summary jurisdiction of the referee as to any other matter or claim in dispute between it and the bankrupt estate having no bearing upon the title or right to possession of these bonds. It did not, by filing its petition for reclamation, indicate or evince its consent that the referee should hear or adjudicate any such unrelated matter or claim.

The trustee's attempted cross-action, set up in his answer, is in its nature unsuitable to and out of place in the reclamation proceeding. The latter is in rem, in effect a replevin action; the cross-action is in personam, and is further inappropriate for the reason that it calls for relief which the referee is not empowered to grant. The petition for reclamation prayed that certain bonds be returned to the respondent as the owner thereof. The trustee prayed that reclamation be denied, and, in addition, that the respondent be required to pay a large sum to the trustee. It is the universal rule that where claims are filed with the referee against a bankrupt estate, the referee is without power to enter a judgment against the claimant for an amount in excess of the claim. He may consider offsets in favor of the estate only to the extent of reducing or extinguishing the claim, but for any excess the trustee must resort to a plenary action. The rule is stated in *Remington on Bankruptcy*, §1471, as follows:

> "Likewise, there may be no judgment in the bankruptcy proceedings against the claimant where the estate's offset exceeds the creditor's claim. The trustee must seek his remedy by plenary action."

This rule is supported also by the following cases:

In Re Continental Producing Co., 261 Fed. 627;

In Re Peacock, 178 Fed. 851;

Fitch v. Richardson, 147 Fed. 196.

We perceive no difference in principle, on this proposition, between the ordinary claim for a debt filed against the estate and a claim for the recovery of specific personal property. Both are summary proceedings. The claim for debt, if allowed, is payable out of the property of the estate after it is reduced to money, either as a preferred claim payable in full, or a general claim payable pro rata. The claim for specific personal property in a reclamation proceeding, if allowed, operates to withdraw the property concerned from the corpus of the estate. The effect in both instances is relatively the same. There is no more reason why the referee should be permitted to enter an excess money judgment against the claimant in reclamation proceedings than against the claimant for a debt.

III.

RESPONDENT DID NOT CONSENT

The respondent appeared in the bankruptcy court only for the purpose of reclaiming the bonds described in its petition, which tendered no issue other than the title to the bonds. Its appearance for that specific purpose cannot be construed to be a general appearance for all purposes. It was still a New York corporation, entitled to be sued there by the trustee as to every matter not within the legitimate and proper scope of the reclamation proceedings. By submitting itself to the jurisdiction of

the bankruptcy court in asking to reclaim the bonds, the respondent became subject only to such defenses as the trustee could properly assert in such proceedings.

By filing its petition for reclamation, the respondent did not consent that any other matters in controversy or affirmative claims or causes of action should be heard or adjudicated by the referee. It objected to that part of the trustee's answer which sought to bring in such extraneous issues, and moved to strike it out. When the referee refused, the respondent filed a written dismissal of its petition and withdrew from the hearing. Nothing more emphatic could have been done than was done by counsel for the respondent to make clear that it did not consent to the wrongful assumption of jurisdiction by the referee, but, on the contrary, was protesting against it. (Printed Record, pp. 9, 10, 19, 30.

IV.

DISCUSSION OF AUTHORITIES CITED BY PETITIONER

In their reasons relied upon for allowance of the writ (petition, p. 9), counsel assert that the decision of the Circuit Court of Appeals in the case at bar is in conflict with *Operators' Piano Co. v. First Wisconsin Trust Co.*, 283 Fed. 904, decided by the Circuit Court of Appeals for the Seventh Circuit. In that case Operators' Piano Company secured certain pianos from the bankrupt after adjudication, and the trustee brought suit against the company for their value. This suit was not commenced in the bankruptcy court, which was in Wisconsin, but in the United States district court in Illinois, which had jurisdiction of Operators' Piano Company by virtue of

the fact that the latter company was a citizen of Illinois, while the trustee was a citizen of Wisconsin, and the amount involved was alleged to be in excess of $3,000. It was a plenary action by the trustee against a party alleged to have wrongfully obtained property belonging to the bankrupt estate, instituted in a court within whose jurisdiction the defendant resided, and having jurisdiction by reason of diversity of citizenship and amount involved. The situation was altogether dissimilar to that presented in the case at bar.

The Operators' Piano Company objected to the jurisdiction of the Illinois federal court on the ground that the amount involved was less than $3,000, that therefore diversity of citizenship did not confer jurisdiction, that the suit was of such a nature as to require the consent of the defendant before it could be maintained against it (relying upon §23b of the Bankruptcy Act), and that it had never consented. The Circuit Court of Appeals held, in substance, that the trustee had the right to bring suit to recover the value of the pianos in the Illinois federal court, provided the usual conditions governing jurisdiction based on diversity of citizenship were shown to exist, and that they did exist in the Operators' Piano Company case, affirming the judgment of the court below.

In arguing to that conclusion, the court in the opinion pointed out the distinction between the case before it and a hypothetical case where the Operators' Piano Company might have come into the bankruptcy court and submitted itself to its jurisdiction, either by itself asking for relief, or by appearing therein and joining issue on the merits, thereby expressly or impliedly consenting to the

exercise of summary jurisdiction by the bankruptcy court. In that case, the court said, the adverse claimant "opens the door to such defenses as the trustee in bankruptcy possesses, and all such issues and all such defenses (including affirmative claims) may be properly litigated in the summary proceeding."

We call attention, first, to the fact that the court's comment was purely argumentative, and applicable only in an argumentative sense to the case before it, which had nothing to do with the summary jurisdiction of the bankruptcy court, and in which neither the trustee nor the Operators' Piano Company had sought to invoke that jurisdiction. It was not as if the trustee had served Operators' Piano Company with an order to show cause before the referee why it should not return the pianos or pay their value, and the Company had appeared and answered to the merits; it was not as if Operators' Piano Company had filed a petition with the referee praying for possession of the pianos. Neither was it a case in which Operators' Piano Company had filed its petition to reclaim pianos from the possession of the trustee, and the trustee in his answer, in addition to a denial of the company's title to and right of possession of the pianos, had attempted to set up a cross-action in no way related thereto, and not a defense or counterclaim to the company's claim respecting the pianos.

The expressions of the court in the opinion in the Operators' Piano Company case relative to summary jurisdiction are in the nature of obiter dictum, not being necessary to the decision in that case, but those expressions are not in conflict with the decision of the Circuit

Court of Appeals in the case at bar. In the Operators' Piano Company case the court did not say that the trustee, in his answer to a reclamation petition, could set up an entirely distinct cause of action not related to the subject of the reclamation proceeding, or that a party filing a petition to reclaim specific personal property in the possession of the trustee thereby consented that the referee should adjudicate accounts and rights to money or choses in action not in the trustee's possession but far removed from the territorial or physical jurisdiction of the bankruptcy court, and of such a nature as to require adjudication by a court endowed with plenary powers and jurisdiction.

Petitioner relies also upon *In re Carl Dernburg & Son*, 5 F. (2nd) 37, in which Emma Dernburg had guaranteed the payment of bankrupt's promissory note for $15,000, and, upon his failure to pay it, took up the note and filed claim for it in the bankruptcy court. The trustee filed objections alleging that the petitioner had received cash, notes and accounts aggregating $3,777.60, in the nature of voidable preferences, which she had failed to surrender, and praying that the claim be disallowed or reduced. The court held that, by filing the claim the claimant consented to the jurisdiction of the bankruptcy court to consider any defenses lawfully interposed, and that it had jurisdiction to pass on the question of voidable preferences. This ruling is in consonance with the ordinary practice as to claims filed in bankruptcy. As pointed out in the preceding portion of this brief (pp. 5, 6), the referee has power to consider offsets to claims filed to the extent of reducing or extinguishing

them, but not to deal with or render judgment for any excess beyond the amount of the claim.

Remington on Bankruptcy, §1471.

The Dernburg case is not in conflict with the decision in the case at bar.

The petitioner contends also that the decision of the court below is "in a way probably in conflict" with *Robertson v. Howard,* 229 U. S. 254. In that case the bankruptcy proceedings were in the federal court in Illinois. Among the bankrupt's assets were certain certificates of purchase from the state of Kansas to tracts of school land in that state which the bankrupt turned over to the trustees, who advertised and sold them in Illinois, and executed to the purchasers assignments of all the right, title and interest of the bankrupt in the land. The title of these purchasers was afterwards assailed in the Kansas courts by other parties claiming title to the land on the ground that the bankruptcy court was without power to convey title to land in Kansas by its sale in Illinois. The supreme court of Kansas held the sale void, but its decision was reversed, on writ of error, by this court. Without enlarging further upon the facts and issues in that case, we submit that it has not the most remote application to the facts and issues in the case at bar, and is, in no sense, in conflict with the decision therein. This court, in *Robertson v. Howard,* supra, held merely that the referee had power, by a sale in the territorial jurisdiction of his bankruptcy court, to convey the bankrupt's title to land in another state, without resorting to ancillary proceedings in the state where the land was situated.

In addition to the foregoing alleged grounds upon which he seeks the allowance of a writ of certiorari, the petitioner contends that the reclamation proceedings before the referee, and the trustee's alleged right to maintain a cross-action as to unrelated matters therein, are governed by the general equity rules prescribed for the federal courts on their equity side. Counsel cite numerous authorities (Brief, pp. 29, 30) showing that General Order No. XXXVII, stating that the rules of equity practice shall be followed in proceedings in equity instituted to enforce and carry into effect the bankruptcy act, does not apply to administrative proceedings before the referee but only to suits and proceedings brought in the federal courts in aid of bankruptcy proceedings.

In the opinion of the court below (Printed Record, p. 48) the same principle is adhered to, and the court quotes from *Weidhorn v. Levy*, 253 U. S. 268, to the effect that the jurisdiction of the referee cannot be extended to include jurisdiction over an independent and plenary suit, but is limited to ordinary administrative proceedings "and such controversial matters as arise therein and are in effect a part thereof." The attitude of the petitioner here is not that the decision of the Circuit Court of Appeals in the instant case is out of harmony with any of these decisions, but that they should all be set aside and disregarded because he is right and they are wrong.

These decisions, to the effect that the general equity rules do not apply to summary proceedings before the referee in bankruptcy, are founded upon common sense and sound logic. If they did apply, then proceedings before the referee, which were intended to be summary

in character and limited in scope, would be so amplified and extended as to convert the bankruptcy court into a court of chancery, with all its varied powers and functions. We submit that no good reason has been shown why the decision of the court below should be reviewed with respect to this sound and salutary ruling.

V.

CONCLUSION

When the trustee's answer containing the paragraph attempting to set up a cross-action was filed, and the matter came up before the referee on the respondent's motion to strike out that part of the answer, it must have then and there been apparent to him that the paragraph in question had no relation to the title or right to possession of the bonds which the respondent was seeking to reclaim, and that it was, in substance, a suit for a balance of money claimed by the trustee to be due on account, in other words, for a debt or for money not in the trustee's possession. Under such circumstances, since the attempted cross-action related to a mere debt and not to property in the possession of the trustee, the referee was without jurisdiction to adjudicate the matter, and the respondent could not be brought into the bankruptcy court with respect to it, but was entitled to be heard in a plenary action.

Remington on Bankruptcy, §2350, Vol. 5, p. 410 (as modified by Supp. Sept. 1930, p. 119).

Priest v. Weaver (C. C. A.), 43 F. (2nd) 57.

Fort Dearborn Trust & Savings Bank v. Smalley (C. C. A.), 298 Fed. 45.

Johnston v. Spencer (C. C. A.), 195 Fed. 215.

Shea v. Lewis (C. C. A.), 206 Fed. 877.

In Re Uittenbogard (C. C. A.), 295 Fed. 778.

No good grounds appearing for the interposition of this court, we respectfully pray that the petition for a writ of certiorari be denied.

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